Supreme Court, U.S.
FILED

No. 051078 FEB 21 2006

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In The

Supreme Court of the United States

STATE OF MINNESOTA,

Petitioner,

vs.

JAMES A. ALLEN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Blakely v. Washington*, 542 U.S. 296 (2004), require a jury finding or waiver before offender-related facts, such as unamenability to probation, can be used to support a departure from the presumptive sentence, or is *Blakely* limited to facts related to the offense itself?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Minnesota, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Minnesota Supreme Court in this case.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at *State v. Allen*, 706 N.W.2d 40 (Minn. 2005); Appendix ("App.") 1-15. The opinion of the Minnesota Court of Appeals, which the Minnesota Supreme Court reversed, is unpublished. No. A04-127, 2004 WL 1925881 (Minn. Ct. App. Aug. 31, 2004); App. 16-21.

JURISDICTION

The Minnesota Supreme Court entered its opinion on November 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents a question under the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On July 19, 2003, the police were called to a residence and encountered Respondent Allen. App. 2. Allen told the police he had driven to the residence. *Id.* The police knew that his driver's license had been canceled as inimical to public safety, and observed several indications that he had consumed alcohol. *Id.* Placed under arrest, Allen refused to perform a breath test. *Id.* He was charged with two felonies – first-degree driving while under the influence and first-degree test refusal – and also charged with gross-misdemeanor driving after the cancellation of his license. *Id.* at 3. He pled guilty to first-degree test refusal in exchange for dismissal of the other charges. *Id.* Allen was assigned one criminal history point because he was on probation at the time of this offense; his presumptive sentence was 42 months, stayed (meaning that he would be put on probation, with the 42-month sentence to be executed if he violated probation). *Id.* Based on his thirteen prior alcohol-related offenses and his history of violating probation, the district court found that Allen was not amenable to probation and sentenced him to an executed 42-month prison term, an upward dispositional departure from the presumptive sentence.[1] *Id.* at 3, 18-19.

Allen appealed, arguing that the district court abused its discretion in imposing the dispositional departure. While the appeal was pending, this Court issued its decision in *Blakely v. Washington*, 542 U.S. 296 (2004). The Minnesota Court of Appeals affirmed, concluding that

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[1] A dispositional departure is the imposition of an executed prison term when the presumptive sentence is a stayed prison term, or vice versa; a durational departure is a change in the length of the presumptive prison term.

ample evidence supported the district court's finding of unamenability to probation. App. 20-21. The court declined to address the implications of *Blakely*, noting that the issue had not been briefed and stating that "*Blakely* does not appear applicable" to a dispositional departure based upon unamenability to probation. *Id.* at 18-19, n. 1.

The Minnesota Supreme Court reversed. In one paragraph of analysis, the court cited language from previous decisions of this Court – none of which dealt with offender-related facts like unamenability to probation – and concluded that *Blakely* applies to dispositional departures based on offender-related facts because it "applies to '[a]*ny fact* (other than a prior conviction) which is necessary to support a sentence exceeding the maximum.'" App. 10-11 (quoting *United States v. Booker*, 543 U.S. 220, 244 (2005)) (emphasis added by Minnesota Supreme Court).

REASONS FOR GRANTING THE PETITION

This case presents this Court with an opportunity to answer an important question on which lower courts are split: Does *Blakely* only apply to facts about the crime that affect sentencing (offense-related facts, e.g., whether a gun was used in the crime)? Or does it apply more broadly to include facts about the perpetrator (offender-related facts, e.g., whether the offender is amenable to probation)?

That this is an important question cannot be seriously disputed: the answer will have a direct and significant effect on numerous states, and will have an indirect effect on every legislative body considering sentencing reform. Further, in reading *Blakely* expansively and rejecting any distinction between offender-related and offense-related

facts, the Minnesota Supreme Court ignored both the plain language of the United States Constitution and *Blakely's* animating principle.

A. Whether *Blakely* Applies To Offender-Related Facts Is A Pressing Issue Of Nationwide Importance.

Whether *Blakely* applies to offender-related facts is an important question, for four reasons.

First, the resolution of this issue will directly and significantly affect numerous states. "By current count, *Blakely* has injected a new element of constitutional uncertainty into the project of sentencing reform in as many as twenty states." Kevin R. Rietz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 Colum.L.Rev. 1082, 1087 (May 2005).

Second, resolution of this issue will resolve a split among the states that have considered the breadth of the *Blakely* rule.[2]

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[2] *Compare DeHerrera v. People*, 122 P.3d 992, 994 (Colo. 2005) (noting that Colorado law permits a departure based on, inter alia, a "pattern of conduct which indicates whether [the defendant] is a serious danger to society, past convictions, and possibility of rehabilitation," and holding that judicial finding that there was a short period of time between the defendant's release from prison and the commission of the current offense did not violate *Blakely*); *State v. Lowery*, 826 N.E.2d 340, 352 (Ohio Ct. App. 2005) (holding that *Blakely* was not violated by judicial finding of likelihood of recidivism); *State v. Carr*, 53 P.3d 843, 850, 852 (Kan. 2002) (holding that judicial finding that defendant was not amenable to probation, which was used to "impose a prison sentence rather than presumptive probation as dictated by the guidelines," did not violate the Sixth Amendment); *with State v. Hughes*, 110 P.3d 192, 202 (Wash. 2005) (holding that *Blakely* does not allow judicial

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Third, resolution of this issue will not only affect those states to which *Blakely* applies – i.e., those states with non-advisory sentencing guideline systems – it will also affect any other jurisdiction that has a law allowing for an increase in the maximum sentence set out by statute when an offender-related fact is found by a judge. Under the Minnesota Supreme Court's interpretation of the Sixth Amendment, such an increase is precluded by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but on this conclusion other courts are split.[3]

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finding that the defendant would not benefit from rehabilitation); *Smylie v. State*, 823 N.E.2d 679, 682, 687 (Ind. 2005) (holding that *Blakely* was violated by judicial finding on aggravating factors that included "pattern of criminal activity"), *cert. denied*, 126 S. Ct. 545 (2005); *State v. Warren*, 98 P.3d 1129, 1133, 1136 (Or. Ct. App. 2004) (rejecting distinction between facts that are "intrinsic" to the current crime and those that are "extrinsic" to it, and holding that "facts characterizing the defendant" must be found by a jury under *Blakely*).

[3] *See, e.g., Kaua v. Frank*, ___ F.3d ___, No. 05-15059, 2006 WL 51178 *3 (9th Cir. Jan. 11, 2006) (rejecting Hawaii Supreme Court's holding that judicial finding that a sentence is necessary for the protection of the public is "extrinsic" in nature and does not go to an "intrinsic" or "elemental" fact of the crime and therefore does not violate *Apprendi*); *Brown v. Greiner*, 409 F.3d 523, 534 (2d Cir. 2005) (holding that the New York Court of Appeals did not act unreasonably in distinguishing from the type of fact-finding at issue in *Apprendi* a determination "that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest"); *People v. Thomas*, 110 Cal.Rptr.2d 571, 578-79 (Cal. Ct. App. 2001) (upholding against *Apprendi* challenge judicial finding that the defendant had served two prior prison terms and citing numerous cases for the proposition that *Apprendi* does not require "jury trials on matters other than the precise 'fact' of a prior conviction . . . courts have held that no jury right exists on matters involving the more broadly framed issue of 'recidivism'" because recidivism "is unrelated to an element of a crime"), *rev. denied* (Cal. Oct. 31, 2001), *cert. denied*, 535 U.S. 938 (2002).

Fourth, resolution of this issue will indirectly affect every legislative body considering sentencing reform, by clarifying whether a non-advisory sentencing guideline system carries with it the "substantial constitutional tax"[4] of a jury-trial right not only for offense-related facts, but also for offender-related facts. The practical difficulties with submitting offender-related facts to a jury, which are discussed below, may well deter legislatures from creating non-advisory sentencing guideline systems to reduce sentencing disparity.

To expand on the first reason, and focus on Minnesota, application of *Blakely* to offender-related facts will have a significant impact on the criminal justice system. In 2004 there were 565 upward dispositional departures in Minnesota, in 2003 there were 581, and in 2002 there were 531.[5] Under the Minnesota Supreme Court's decision in *Allen*, in all these cases, a jury, rather than the judge, should have found any offender-related facts relied upon for the dispositional departure.

How this will work in practice is unclear. Offender-related sentencing facts, such as unamenability to probation, will often not be discovered until the preparation of the pre-sentence investigation report ("PSI"), but at that point the jury will have been discharged. Therefore, a determination of unamenability to probation, or other offender-related facts relevant to sentencing, will either: (1) have to be made without a PSI; or (2) the jury will have

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[4] *Blakely*, 542 U.S. at 2546 (O'Connor, J. dissent).

[5] *See Sentencing Practices Annual Summary Statistics for Felony Offenders Sentenced in 2004* at 31, http://www.msgc.state.mn.us/Text%20Only/sentencing_practicies_data_reports.htm#04data.

to be recalled when the PSI is completed, which is usually some months after the trial; or (3) when the PSI is completed a new jury will have to be called. Option (1) is illegal in Minnesota, and will lead to sentencing with less information about the offender;[6] the expense, time commitment and practical difficulties of options (2) and (3) are obvious.

B. The Minnesota Supreme Court's Decision Significantly, And Erroneously, Expanded The Scope Of *Blakely* By Applying It To Offender-Related Facts.

The Minnesota Supreme Court's decision here runs afoul of both *Blakely's* animating principle and the plain language of the United States Constitution. *Blakely* is based on the limit the Sixth Amendment creates on "States' authority to reclassify elements as sentencing factors." 542 U.S. at 302, n. 6. *Blakely* prevents a state from changing elements of a crime to "sentencing factors" and thereby eliminating the need to prove those elements

[6] That a PSI is critical to a judge's ability to make an informed sentencing decision is illustrated by Minnesota law, which requires a presentence investigation and written report before a defendant can be sentenced for a felony. Minn. Stat. § 609.115, subd. 1 (2004). *See also* Fed. R. Crim. P. 32(c) (requiring PSI, with some exceptions); *Williams v. New York*, 337 U.S. 241, 250 (1949) ("We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.").